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JUDICIAL USURPATION

by Felix Morley

On November 23, over the signature of its Governor, the Commonwealth of Pennsylvania released a very significant official advertisement.

This advertisement pointed out that present policies of the Federal Trade Commission are forcing manufacturers to move closer to the centers of steel production. With commendable alertness, Governor Duff and his Secretary of Commerce therefore ask business men whether they would not be well-advised to establish factories in Pennsylvania without delay.

The particular desirability of the Pittsburgh area is emphasized, and the enormous present concentration of population in and around Pennsylvania is cited as further argument. To quote the advertisement:

> "A Supreme Court decision outlawing the historic basing-point system of prices for cement is forcing steel companies to abandon the basing point system on steel as well. It has been predicted that this will mean a great competitive advantage to steel fabricators and steel consumers located close to steel producing centers, and comparable disadvantages to companies far removed from steel centers."

On April 26 of this year, when the Supreme Court handed down the decision to which this advertisement makes reference, few people other than manufacturers had any realization of its implications. Though retail prices are a lively subject, such fundamentals as the difference between F.O.B. mill pricing and basing-point pricing is Greek to the average consumer.

But everyone can understand the overtones in an advertisement which announces that the congested cities of a highly industrialized state are going to become even more congested. And anybody possessing any imagination can recognize the undesirability of herding new masses of industrial labor into areas already as overcrowded and beset with social problems as is Pittsburgh.

Sociologists have roundly condemned the industrialists of an earlier era for the indifference to human values which characterized their concept of free enterprise. What, then, can be said for a Federal agency which, consciously or unconsciously, works to promote the development of those very slums which enlightened business leadership now seeks to eliminate through industrial dispersion?

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The essence of the Cement Institute Case, as determined by the majority opinion which Mr. Justice Black delivered on April 26, can be briefly put.

The Supreme Court ruled on the charge, earlier dismissed by the Seventh Circuit Court of Appeals, that "respondents had restrained and hindered competition . . . by means of a combination among themselves made effective through mutual understanding or agreement to employ a multiple basing-point system of pricing".

The essential feature of this pricing system is that, in order to secure distant markets, the manufacturer absorbs freight charges to accepted "basing points", usually closer to the desired market than the actual shipping point. On the other hand, when a basing point is further from a particular market than the actual shipping point, then the non-existent freight charge from the basing point to that shipping point will customarily be added to the price. The cost of this fictitious shipment is known as "phantom freight".

The effect of the basing-point system, of course, is to make freight charges uniform, to equalize the value of location, to stabilize prices and therefore to encourage industrial decentralization. For this reason the armed services, thinking in terms of the effect of atomic bombs on congested industrial areas, are showing a keen professional interest in the whole problem.

The majority decision of the Supreme Court last April upheld the Federal Trade Commission complaint, in spite of a blistering dissenting opinion by Mr. Justice Burton. He pointed out that the basing-point price system has been in use by industry for half a century; that "Congress has repeatedly refused to declare its use illegal", and that the issue before the Court was not one for judicial decision.

Furthermore, said Mr. Justice Burton, the Supreme Court in this opinion "has neither reversed nor directly passed upon the principle conclusion of law reached by the court below". In other words, according to the dissenting Justice, the Court has abandoned its strictly judicial function to proclaim the intolerable doctrine that executive agencies are entitled to make their own law.

The assumption of the Federal Trade Commission is that substantial price identity, resulting from the basing-point system, is evidence of conspiracy in restraint of trade. The procedure is called "inherently collusive". It is, of course, no more collusive than industry-wide wage-fixing, or nation-wide subsidization of farmers.

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III

As indicated by the action of the State of Pennsylvania, noted above, the economic effects of this questionable judgment have already been profound.

So much uncertainty as to the legality of established pricing policies was immediately aroused that the Senate, last June, authorized hearings by its Interstate and Foreign Commerce Committee on the effects of the Cement Institute decision. These hearings, before a trade policy subcommittee headed by Senator Capehart, are now going on. They are producing some extremely interesting testimony.

Many companies have already abandoned the basing-point system of prices, substituting the old free-on-board (F.O.B.) pricing under which the purchaser pays all the transportation charge. The effect of this on purchasers remote from their sources of supply is disastrous, as pages of testimony before the Capehart Committee already show.

The picture is clarified by taking, almost at random, the testimony of one relatively small manufacturer in Cincinnati. He is William L. McGrath, President of the Williamson Heater Company.

As reported, Mr. McGrath told the Capehart Committee that he normally buys steel both from nearby Middletown, Ohio, and more distant Weirton, West Virginia. Actual freight from Middletown to Cincinnati is 12 1/2 cents per hundredweight of steel. Actual freight from Weirton to Cincinnati is 47 1/2 cents per hundredweight, but under the basing-point practice Weirton absorbed the difference.

Now, under F.O.B. pricing, Mr. McGrath must pay an increased 35 cents per hundredweight, or $7 a ton, for steel bought from Weirton, reluctantly passing the increased cost on to his customers. And from the viewpoint of seller, instead of buyer, the testimony of this witness is equally significant. If he sells without absorbing freight charges, and, conversely, without adding "phantom freight", the result will be to give him a practical monopoly in the immediate vicinity of Cincinnati. But he will not be able to meet competition beyond a 300-mile radius from that city.

The economic consequences of the Supreme Court decision are indicated by that single illustration. But the political implications are perhaps even more far-reaching.

IV

In the Cement Institute Case the Supreme Court at least inferentially approved a quasi-legislative price-fixing power for the Federal Trade Commission.

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Indeed the freedom of this agency to establish administrative law was emphasized by the opinion handed down by Mr. Justice Black on April 26, for he asserted that:

> ". . . the Commission has a wide discretion generally in the choice of remedies to cope with trade problems entrusted to it by the Commission Act."

This assertion brings us up squarely against a fundamental principle of political philosophy. As expressed by John Locke, in his famous Treatise of Civil Government, and as adopted as a basic principle of American Government:

> "The legislature cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others."

In the present issue the violation of fundamental principle is particularly flagrant. The case is not one in which Congress improperly transferred power to the Federal Trade Commission. On the contrary Congress has said flatly, on more than one occasion, that this executive agency shall not assume the power which it is now actually exercising.

The controversy should help to bring out an important, but little realized, characteristic of regulatory agencies like the Federal Trade Commission. This is their tendency steadily to expand the area of original jurisdiction. Indeed, it may be stated as a political law that the more alert and active the governmental agency, the less likely it is to restrict its activities to the field originally defined.

President Woodrow Wilson recommended establishment of the Federal Trade Commission in his Message to Congress of January 20, 1914. He then said: "What we are purposing to do . . . is, happily, not to hamper or interfere with business as enlightened businessmen prefer to do it. . . . The antagonism between business and government is over."

It is a far cry from that hopeful assertion to the observation that "administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence", to quote from the Supreme Court Judgment of April, 1948.

The authority of the Supreme Court to grant the Federal Trade Commission powers denied to it by Congress is dubious, to say the least. Mr. Justice Burton has put it plainly, in the text of his dissenting opinion on the cement case:

> "We know of no criticism so often and so forcibly directed at courts, particularly Federal courts, as their propensity for usurping the functions of Congress. If this pricing system which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation."

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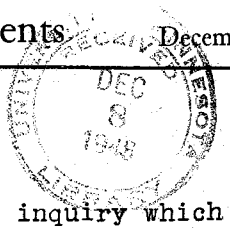
Not Merely Gossip *A Supplement to* Human Events December 1, 1948



By Frank C. Hanighen

Next week, Senator Flanders, of Vermont, will commence an inquiry which will examine, inter alia, the question of large corporation profits. Since Flanders is a business man, he does not equate "profits" with original sin and will undoubtedly provide some educational material for those who think emotionally about the matter. It will be none too soon, for the stage is being set, with gallows and mob (of New Deal columnists) for a lynching of "big business" and "excess profits". Already some columnists are warming up, with talk of "inordinate" gains and rich dividends to "fat stockholders", and all that. After all, the Administration must have a big budget to pay off pressure groups which provided votes at the elections, and the one available taxpayer area which has few votes is that of the soulless corporations.

David Lawrence in his Washington Star column (November 27) produced some statistics which, it is believed, will receive an airing during the Flanders probe. Lawrence examines the figure of an estimated $20 billion profits for 1948 -- already a handy target for Administration fuglemen. He asks and answers these pertinent questions: Have profits been used to rebuild and repair plant and equipment? Or, have they been used merely to give stockholders more dividends? In 1948, Lawrence reports, over $19 billion of the $20 billion estimated profits is being expended for new plant and equipment. The total of such expenditures for the last three years runs over $47 billion. About $42 billion of this amount was financed "internally" out of profits.

But, how about the "greedy" stockholders and the "over generous" corporation managements? "In the post-war period", says Lawrence, "less than one-half of net earnings has been disbursed to stockholders in dividends as contrasted with three-fourths in 1939 and two-thirds in 1929. Conservative dividend policy has been prompted by a desire to avoid borrowing and to avoid seeking equity capital in markets where the investors are plainly discouraged and reluctant to invest." In conclusion Mr. Lawrence remarks: "It is strange how little one hears about what happened to the record $20 billion profits earned this year or last by corporations -- the soundest phase of recent economic development, the real cushion against depression, and the greatest barrier this country has devised to beat inflation through high production."

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A Washington news story, on November 28, "Norfolk Line Closes Down", probably had no financial significance for most readers. But it did make Washingtonians mourn the passing of a traditional pleasure journey. At 6 p.m. of a hot summer evening you could park your car in the hold of the Norfolk boat, then cool off on the top deck as the steamer rolled down the Potomac past Mount Vernon. You awakened the next morning in Hampton Roads, indeed a sight to see. From Norfolk you could motor back to the Capital through such historic places as Yorktown and Williamsburg. But, no more. Some weeks ago, the steamer was irreparably damaged in a collision with a tanker in Hampton Roads. And now the Norfolk Line company has announced its intention to dissolve. When a Treasury friend who loved the journey complained, we were able, unkindly, to recriminate -- "It's your work".

The demise of the Norfolk Line is a casualty of the war, the ensuing inflation and the tax laws. When the war began, the company had three boats. But after Pearl

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Harbor the Government took two of them for troop transport, and they never came back. After the war ended, the company asked a Wilmington shipbuilding firm for a price on a new boat. Wilmington quoted $3,500,000, which stands in some contrast to the original cost of the damaged boat -- $800,000. This picture explains why, after the recent collision, the Norfolk Line directors did not even bother to ask for a new price, in view of rising costs since 1945; and why they decided to throw in the sponge. Theoretically, the Line could float a loan on the capital market, get a new vessel and resume operations. Actually, today, the capital market cannot absorb such financings. Under present tax rates, investors won't take the risk for an inadequate net return. Of course, liquidation of the Line represents no real economic loss to the country. As a case history, however, it is illuminating. The sad plight of the Line is duplicated many times throughout American industry. Numerous companies are now faced with the problem of renewing equipment at from five to ten (at least) times the original cost.

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It would be a mistake to say that the Republicans in general have done some serious thinking about the reasons for their defeat and the fundamental weaknesses of their party. At present, too many merely feel a consuming hatred for Dewey and can only unite on fighting the Governor's leadership. However, it is interesting that there is some discussion about the necessity of Republicans uniting with conservative Democrats. One former Republican Member of Congress is quite vocal on the subject. Mr. T. W. Phillips, Jr., of Butler, Pennsylvania, Member of the 68th and 69th Congresses, launched his idea of merging Jeffersonian Democrats and Republicans way back following the debacle of 1936. Today he is constrained to ask, "wouldn't it have been better if we had"?

Following the Republican defeat on November 2 last, Mr. Phillips sent a circular letter addressed to "Fellow Republicans" which carried the following stirring conclusion: "It is the Northern Republicans rather than the Northern Democrats who should be aligned with the Southern Democrats. In fact, they simply must amalgamate. Unless they pull together rather than pull apart, we do not stand a Chinaman's chance of preserving our system of government." And he offers this vista: "If the Republican Party would now at this late date fold up as a national party, it is at least possible that the so-called 'Dixiecrats' would draw enough support from the Republicans and the conservative Democrats to challenge successfully the Democratic Party, possibly in 1952, probably in 1956, and almost certainly by 1960 -- one hundred years after the Republican Party first succeeded in electing its candidate to the Presidency."

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Let us suppose that in 1941 a Commerce Department official had decided that trade should be encouraged with Nazi Germany, and had written a book supporting that thesis. Could he have obtained a publisher? Of course not -- the supposition that an official would even entertain such ideas is ridiculous. As a matter of fact, a Commerce official in that year, Douglas Miller, was author of a best seller, You Can't Do Business with Hitler. We were then in a cold war with Nazi Germany.

Today we are in a cold war with Soviet Russia. This column has looked in vain for appearance of a volume entitled You Can't Do Business with Stalin. However, we scarcely expected to behold what we beheld Sunday, November 29, in the New York Times and Washington Star, namely, reviews of a book entitled Let's Do Business with Russia, by Stella K. Margold, published by the austere firm of Harpers. According to the reviewers, Mrs. Margold complains that "witch hunts" and "press campaigns" in

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this country have reduced trade with Russia to a negligible amount and she advocates a loan to Soviet Russia. The Times reviewer was slightly reproving. Incidentally, Mrs. Margold is identified as "with the Department of Commerce".

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Since the election, the dismantling of plants in western Germany has increased, according to reliable informants just back from Germany. All the old Morgenthau-minded elements in the American Occupation, to some extent held in check during the past year, have again come to the fore as a result of Truman's election. As a matter of fact, dismantling -- contrary to the popular impression -- was not suspended this fall as a result of Mr. Hoffman's efforts. On October 15, this column received word of the dismantling of an important machine tool plant in the American zone of western Germany and the British actually redoubled their dismantling activities during October. The British proceeded under the guise of "restitution", instead of "reparations".

Before the election, it had been expected that after a Dewey victory the plundering of German industry at our expense would be well exposed and would be stopped. Not only is there little indication of ending this destructive policy, but the American public is not getting the true picture. On November 23, the United Press sent out a Washington dispatch, saying that the Congressional Watchdog Committee (which probably also will be dismantled) on Foreign Aid "is weighing a confidential report charging that British and French policies in Western Europe are wasting the American taxpayer's money". We have found but one paper which used this news story; it did not appear in the New York Times. The report charges the British with furthering an "uneconomic" nationalization of German industries and with promoting inefficiency and waste; and the French with "drawing off the resources of their zone for French domestic use, while the United States has been pumping funds into the French zone to speed its economic recovery". According to the UP, the report also assails "what it calls the failure of the Western Powers to revise the German plant dismantling and reparations program to conform with the 'realities' of European recovery needs. . . . An all out effort to reactivate German industry comes into conflict with large-scale dismantling of plants for reparations and with a policy of exporting German coal to the liberated countries of Europe while German factories are idle for lack of coal."

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A gentler wind seems to be blowing in the Adriatic. The Berne radio reported that "vital talks between Tito and Washington took place in all secrecy . . . on the island of Pironi". According to this story, Yugoslavia agreed to withdraw all troops and stores from its occupation zone, to allow U. S. troops in case of emergency to advance to the Wilson Line, and to make available for U. S. troops a favorably situated bridgehead on the Adriatic coast. The state of emergency would come into effect if Yugoslavia were attacked by Russia or Russian satellites. In return, the United States would guarantee Yugoslavia's western frontier and supply industrial products. Efforts to check this report in Washington official circles brought no confirmation. But, it is admitted officially that Yugoslavia has been withdrawing some troops from the Trieste area.

It is also admitted that Marshal Tito is turning his face westward, albeit with some bad grace. While clinging to Moscow ideology, Tito has been forced to confess that the Red boycott of trade relations with Yugoslavia has been so effective that he must seek economic supplies from the West. Washington diplomatic circles, which greeted Tito's defection from Moscow last spring with much skepticism, now readily agree that the split is genuine, that Tito is really turning to the West, and that he seems firmly installed in power. All things considered, the Trieste front once labelled a danger zone, now appears as a bright spot on the otherwise depressing cold war map.

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Book Events

The Limits of Art; collected and edited by Huntington Cairns. New York: Pantheon Books, Bollingen Series XII. $6.50. Reviewed by J. M. Lalley.

I think it the general opinion of readers nowadays that the literary arts are in a bad way; the springs of the imagination have dried up and a season of drought settled upon the world, or at any rate the world of the West. This is hardly the place to ask why the realm of story has been abandoned to the pandar and the solipsist and the realm of poetry to the pedant and the cryptographer; but there is surely some association between these melancholy phenomena and the fact that the art of the anthologist now flourishes as never before. It seems to suggest a kind of spiritual senility, a kind of Byzantine poverty which obliges us to live like so many scholiasts on our cultural capital.

This latest anthology, however, is a very remarkable one, which, were it not for the gulf now separating literature from the life of Society, should earn Mr. Cairns a name at least equal to Percy's or Palgrave's. It is a work that embodies the fruit of a vast, patient and scrupulous scholarship. It purports to present, and probably does present along with much that is doubtful, the finest things that have ever been thought or imagined or felt and expressed in language. The title is borrowed from a phrase attributed to Parrhasius, the celebrated Athenian artist, whose paintings were said to have been so faithful an imitation of nature that even rival painters were wont to confuse them with reality. Such achievements represent those limits of art "which may not be overpassed"; in a word, perfection. The limits, however, as it appears from Mr. Cairns' collection, have been touched with rather gratifying frequency in the last 2800 years or so, although the most recent excursion to the frontier seems to have been that of James Joyce in Anna Livia Plurabelle, which now forms part of Finnegans Wake. Mr. Cairns himself does not attempt to survey and to map the boundaries of art; he is content to take his directions from professional explorers, ancient and modern, of these realms of gold. That is to say, he accepts the word of anyone he deems a competent critic as evidence that the ultimate of beauty has been achieved by such and such an artist in such and such a passage. In each case, Mr. Cairns reproduces the passage and appends whatever superlatives the critic has chosen in describing it. Occasionally, Mr. Cairns admits the merely comparative, as when for example he allows Paul Elmer More to tell us that some of Longfellow's hexameters are as good as any in English; and often the critic is permitted to qualify his dictum with an equivocal "perhaps". Where the passage upon which the verdict is given is in another language than English, the original is presented, and followed by an admirably chosen translation. And so by this method of selection we discover that Shakespeare reached the ultimate of expression in 33 instances, Homer in 21, Milton in 18, but Dante and the Bible only ten times each.

Mr. Cairns' criterion of competence in criticism appears to be reputation; and this is catholic enough to include reputations as various as Aristotle's, Brandes', and Mrs. Colum's. It is elastic enough to include critical principles as irreconcilable as those of the late Irving Babbitt and those of the living Mr. H. L. Mencken. It has, of course, the merit of being an objective standard, and even a scientific one in the sense of being quantitative. But at these limits of criticism we are as far as ever from an objective standard of beauty. The frontiers of art expand and contract to include, now the Pange lingua of St. Thomas Aquinas, and now the Bateau Ivre of Arthur Rimbaud; or to permit such a critic as Maurice Baring to find the most poignant line of all poetry, now in Horace, now in Racine.

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